Supreme Court, U.S.
FILED
JAN 14 1985
CLERK

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, et al.,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SOUTHWESTERN BELL RESPONDENTS' BRIEF IN OPPOSITION

HENRY D. MENGHIN*
ROBERT J. KREHBIEL
EVANS & DIXON
314 North Broadway
St. Louis, MO 63102
(314) 621-7755

Attorneys for Southwestern Bell Respondents

EDGAR MAYFIELD
LEO E. EICKHOFF, JR.
100 North Tucker Blvd.
Room 630
St. Louis, MO 63101
(314) 247-3353

Of Counsel

Counsel of Record

St. Louis Law Printing Co. Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether a finding of mootness based upon the cessation of challenged conduct due to an intervening change in the law presents an issue worthy or review, particularly when the contentions presented in opposition to mootness were either not fairly presented to the courts below or are unsupported by the record.

2. Whether the contention that the *Teamsters* doctrine saves this case from mootness when the rationale for that doctrine is absent and the issue presented was never ripe for review presents an issue worthy of review.

3. Whether the contention that claims for unpleaded special damages and interest on an unliquidated sum saves a case from mootness presents an issue worthy of review.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	8
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	12
Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975)	5
Brown v. Hotel and Restaurant Employees, ____ U.S. ____, 82 L.Ed.2d 373 (1984)	13
Continental Bank & Trust Co. v. American Bonding Co., 630 F.2d 606 (8th Cir. 1980)	16
Cowan v. Southwestern Bell Telephone Co., 529 S.W. 2d 485 (Mo.App. 1975)	5
De Shields v. U.S. Parole Commission, 593 F.2d 354 (8th Cir. 1979)	15
Ellis v. Brotherhood of Railroad, Airline and Steamship Clerks, ____ U.S. ____, 80 L.Ed.2d 428 (1984)	15, 17
Golden v. Zwickler, 394 U.S. 103 (1969)	5

Hechenberger v. Western Electric Co., Inc., 570 F.Supp. 820 (E.D.Mo. 1983) 3, 17, 18

Hechenberger v. Western Electric Co., Inc., 742 F.2d 453 (8th Cir. 1984) 8

Hull v. Southwestern Bell Telephone Co., 565 S.W.2d 809 (Mo.App. 1978) 5

Katsaros v. Cody, 744 F.2d 270 (2d Cir. 1984) 11

Massachusetts Mutual Life Insurance Co. v. Russell, No. 84-9, ____ U.S. ____, 83 L.Ed.2d 29 (1984) ... 17

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 10

North Carolina v. Rice, 404 U.S. 244 (1971) 5

Rogers v. Lodge, 458 U.S. 613 (1982) 8

Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482 (9th Cir. 1983), *cert. granted,* 83 L.Ed.2d 29 (1984) 17, 18

Schneider Moving & Storage Co. v. Robbins, ____ U.S. ____, 80 L.Ed.2d 366 (1984) 10

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972)6, 8, 15, 17

Sosna v. Iowa, 419 U.S. 393 (1975) 5

Strohmeyer v. Southwestern Bell Telephone Co., 396 S.W.2d 1 (Mo.App. 1965) 5

United Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 12

United States v. Alaska Steamship Co., 253 U.S. 113 (1920) 6

United States v. W.T. Grant Co., 345 U.S. 629 (1953) .. 7

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944) 7

Western Casualty & Surety Co. v. Southwestern Bell Telephone Co., 396 F.2d 351 (8th Cir. 1968) 14

Other Authorities:

U.S. Const. Art. III 5

29 U.S.C. §1109 18

29 U.S.C. §1132 2

29 U.S.C. §1132(g) 3, 18

29 U.S.C. §1144(a) 13

Fed. R. Civ. P. 9(b) 9

Fed. R. Civ. P. 9(g) 15

Fed. R. Civ. P. 19 11

Fed. R. Civ. P. 30(d) 15

Fed. R. Civ. P. 54(c) 15

Missouri Revised Statutes
§287.160.3 (Supp. 1979) 2, 5, 10

Missouri Ann. Statutes
§287.160.3 (Vernon Supp. 1984) 5

Sup. Ct. R. 17.1(c) 7

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, et al.,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SOUTHWESTERN BELL RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Richard A. Hechenberger, William V. Wilken, and Charles W. Ramsey have asked this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on August 28, 1984. The Court of Appeals affirmed the District Court's dismissal of petitioners' action as moot.[1] Because the

[1] The Eighth Circuit's opinion is reported at 742 F.2d 453, and is reprinted in Appendix A (App. A) to the Petition for Writ of Certiorari (Pet./Cert.) The decisions of the District Court are reported at 570 F.Supp. 820, 823-25, reprinted in the supplemental appendix (Supp. App.) at SA-2—SA-6, and at 573 F.Supp. 71, reprinted in the Supplemental Appendix at SA-8—SA-10.

decision below is correct and does not raise any questions warranting review by this Court, Respondents Southwestern Bell Telephone Company, Inc. (the Company) and the Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan (the Plan), also collectively referred to hereinafter as "Southwestern Bell respondents," respectfully urge this Court to deny the pending petition.

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is inaccurate and omits pertinent facts. Therefore Southwestern Bell respondents deem it necessary to make the following statement of the case.

This action was filed in the Eastern District of Missouri as a purported class action on January 29, 1982. Jurisdiction of the District Court was invoked, in part, pursuant to Section 502 of the Employee Retirement Income Securities Act (ERISA), 29 U.S.C. §1132. The complaint was amended twice, but the issue presented remained the same: petitioners challenged, as a violation of ERISA, a practice of integrating weekly benefit payments under the Plan for absence paid in excess of that required under the Missouri Workers' Compensation Law for healing period and absences (referred to under the law as "temporary total disability") against awards for residual permanent injury (referred to under the law as "permanent partial disability"). *See* Supp. App., pp. SA-8—SA-9. Offsets against permanent partial disability awards were the only offsets petitioners challenged. The challenged offsets had been authorized by a then existing section of the Workers' Compensation Law, Mo.Rev.Stat. §287.160.3 (Supp. 1979). *See* App. A, p. A-3.

In their second amended complaint, petitioners alleged that the challenged offset practice was not authorized by the terms of the Plan; that respondents violated various ERISA notice requirements by the manner in which the offset was claimed; that the offset amounted to a denial of ERISA benefits; that Plan

fiduciaries violated ERISA by asserting the offset and delegating authority pertaining to benefit decisions; and that ERISA pre-empted that portion of the Missouri Workers' Compensation Law under which the offset was claimed.[2] Petitioners sought injunctive and declaratory relief; imposition of constructive trusts; accountings and interest thereon; punitive damages; attorneys' fees and costs pursuant to 29 U.S.C. §1132(g); and further relief as deemed proper.[3]

Petitioners filed a motion for class certification on June 8, 1983, one week after the District Court had ordered them to do so.[4] A class certification hearing was held pursuant to Wilken's and Ramsey's motion on August 29, 1983.[5]

Prior to the certification hearing, the Company and the Plan moved for summary judgment on the grounds of mootness and lack of ripeness, based upon affidavits and exhibits establishing that the offset at issue had never been taken against a permanent partial award or settlement as to either petitioner Wilken or Ramsey, nor would such an offset be asserted by the Company in any pending or future Missouri Workers' Compensation case. Supp. App., pp. SA-9—SA-10. The announcement was based, in part, upon an intervening change in the state law: the statute authorizing the offset petitioners challenged was to be repealed. *See* App. A, pp. A-3—A-4 and footnote 6, *infra.* On October 17, 1983 the District Court granted the motion for sum-

---

[2] Second Amended Complaint, pp. 5-14. The complaint is contained in the clerk's record, cited as "CR" in the Petition at p. 6 n. 1. The foregoing portions of the second amended complaint are at CR, pp. 22-31.

[3] CR, pp. 31-33. A review of the relief petitioners sought is also set forth in *Hechenberger v. Western Electric Co., Inc.*, 570 F.Supp. 820, 822 (E.D.Mo. 1983).

[4] CR, pp. 83 and 89-91.

[5] CR, p. 186.

mary judgment and denied the motion for class certification. Supp. App. p. SA-7. The Court of Appeals for the Eighth Circuit affirmed, holding that the case was moot. App. A, pp. A-2—A-5.

REASONS FOR DENYING THE WRIT

I.

The writ should be denied because the intervening change in the state law and cessation of the challenged conduct renders all issues fairly presented below moot.

Petitioners characterize the issue presented below as broad, while they assert that the effect of respondents' actions is limited. Neither contention is accurate. When correctly presented, it is clear that petitioners' claim presents nothing worthy of review by this Court.

Read as a whole, the Petition gives the impression that petitioners launched a broad spectrum of challenges with regard to integration of Plan and law benefits. In fact, the key issue presented in both the District Court and the Court of Appeals was quite narrow: whether it was lawful under ERISA to offset awards for permanent partial injuries under the Missouri Workers' Compensation Law with amounts paid under the Plan that were in excess of the amounts required for temporary total disability under the law. Because the Company announced it would no longer engage in this offset practice, and because neither Wilken nor Ramsey had an award for permanent partial disability reduced by such an offset, their claims became moot. The intervening change in the state law and the Company's change in policy ended the controversy between the parties. The issue upon which their entire case was to turn was no longer present.

The Court of Appeals decision was correct under this Court's prior decisions. The power of federal courts to adjudicate causes of action is confined by the Constitution to "cases" or "controversies". U.S. Const. Art. III. It is well settled that a "case" or "controversy" must exist at all stages of litigation and not merely at the time a complaint is filed. *Golden v. Zwickler,* 394 U.S. 103, 108 (1969). It is equally well settled that federal courts are prohibited from adjudicating moot claims. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). Once circumstances arise which terminate the case or controversy between the parties, the doctrine of mootness requires that the action be dismissed as moot. *Sosna v. Iowa,* 419 U.S. 393, 399 (1975). As a general rule, the mootness doctrine requires the same result in a class action if the claim of the class representative become moot prior to certification of the class. *Board of School Commissioners v. Jacobs,* 420 U.S. 128, 130 (1975).

The conduct petitioners challenged was previously sanctioned by a provision in the Missouri Workers' Compensation law which allowed an employer a credit for certain sums paid an employee on account of an injury. *See* Mo.Rev.Stat. §287.160.3 (Supp. 1979). The Missouri courts construed this section of the compensation law to allow an employer to claim a credit for amounts paid under a benefit plan in excess of temporary total disability payments required under the law, against awards under the law for permanent partial disability. *Hull v. Southwestern Bell Telephone Co.,* 565 S.W.2d 809 (Mo.App. 1978); *Cowan v. Southwestern Bell Telephone Co.,* 529 S.W.2d 485 (Mo.App. 1975); *Strohmeyer v. Southwestern Bell Telephone Co.,* 396 S.W.2d 1 (Mo.App. 1965). Effective September 28, 1983, the provision allowing the offset petitioners challenged was amended to prohibit the employer from seeking "credit for wages or such pay benefits paid to the employee or his dependents on account of the injury or death." Mo.Ann.Stat. §287.160.3 (Vernon Supp. 1984).

The Court of Appeals found that the challenged offset practice was abandoned "upon learning of the change in the state statute."[6] App. A, p. A-4. The court further found that none of petitioners had been subjected to the offset in a workers' compensation proceeding.[7] *Id.* Because it was the challenged offset that was the focus of petitioners' entire cause of action, the intervening change in the law[8] and the Company's renunciation of the offset, prior to using it to reduce whatever permanent partial award Wilken or Ramsey might have received, rendered their claims moot. *Id.* At that point, no class had been certified, and the Court of Appeals accordingly held that the class claims were also moot. *Id.*

The court below merely applied this Court's well-settled mootness principles to the facts of this case. The offset petitioners challenged had never been applied to them, and because the statute authorizing the offset had been amended and the Company renounced claiming the offset, no "injury" would

---

[6] This finding of fact is amply supported by the record with respect to the Company which, as employer, had previously claimed the offset pursuant to the repealed statute. *See* Affidavit of Leo Eickhoff, CR pp. 141-143; Letter to Rousselot, CR p. 144.

[7] This factual finding is also fully supported by the record. Petitioner Wilken withdrew his compensation claim after consultation with his attorney. Wilken Deposition Transcript, p. 21. Petitioner Ramsey did not have a hearing on his claim, received no award, and thus had no offset taken against the award. Class Certification Hearing Transcript, p. 21; Affidavit of James Kennedy, CR, pp. 133-134.

[8] An intervening statutory amendment which eliminates the allegedly offensive provisions of a statute renders an action challenging the statute moot. *See Socialist Labor Party v. Gilligan*, 406 U.S. 583, 585 (1972); *United States v. Alaska Steamship Co.*, 253 U.S. 113, 115-16 (1920). The Court of Appeals' decision fully comports with these decisions.

occur. App. A, p. A-4. Considering the foregoing, the Court of Appeals correctly held that petitioners' claims were moot.[9]

Petitioners, in an effort to save their case from mootness, now belatedly add to their case herein a claim they never presented below. They attempt to portray the offset issue as broader than it was, by arguing that respondents are violating ERISA by continuing to integrate Plan benefits with state law temporary total disability benefits, thereby "recovering" Plan benefit payments for the Company.[10] Pet./Cert. at 9 and 11.

---

[9] See App. A, pp. A-4—A-5. Petitioners do not attempt to demonstrate the inapplicability of the cases cited by the Court of Appeals in support of its holding. They merely assert in summary manner that insistence on the legality of the integration practice and the freedom to return to it means that this case is not moot. Pet./Cert. at 8 n.8 and 11. The cases they cite are inapplicable because in this case the resumption of the challenged conduct does not depend solely on the company's capricious actions by which it is free to return to its old ways. *See, e.g., United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944). Unlike the situation in those cases, the Company could return to the challenged offset practice only if either Wilken or Ramsey is reinjured, files a claim for workers' compensation, the Company claims the offset in violation of its prior announced renunciation and in violation of the new Missouri statute prohibiting the offset, and the Missouri Division of Workers' Compensation decides to allow the offset, again in violation of the new statute. Petitioners do not show how the Company could resume the challenged offset practice solely on its own caprice. Thus, they totally fail to demonstrate how the decision of the Court of Appeals conflicts with applicable decisions of this Court. *See* Supreme Court Rule 17.1(c).

[10] Petitioners cite the McGrath deposition transcript at p. 35, lines 5-15 as support for their assertion that respondents "recover" Plan benefit payments in workers' compensation proceedings. Pet./Cert. at 11 n.11. Petitioners fail to inform this Court that, in response to their own counsel's questioning, Mr. McGrath explained that by "recover" he meant that the Company tried to give its workers the better of Plan or law benefits. If the Plan paid more than the law required, the worker kept the difference: the Company did not go against the worker to recover the differnce. McGrath Deposition Transcript, p. 35, lines 22-25 and p. 36, lines 1-22.

As stated above, integration of Plan benefits with state law temporary total disability benefits was never an issue in this case. Petitioners not only did not challenge this offset practice in any of the three complaints they failed in the District Court, they even announced to the Eighth Circuit that offsets against temporary total disability benefits were not an issue in this case. Brief for Appellants at 6, *Hechenberger v. Western Electric Co., Inc.*, 742 F.2d 453 (8th Cir. 1984). Now, for the first time, and contrary to their representation to the Court of Appeals, they assert that offsets against temporary total disability awards violate ERISA under certain circumstances. *See* Pet./Cert. at 11.

A claim that was not adequately presented in the courts below and which was not considered there cannot present a "case" or "controversy" when other issues are moot. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972). In an analogous context, this Court has held that it ordinarily will not review a contention neither raised nor addressed in the courts below. *E.g. Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). It follows that this Court should not entertain an issue petitioners specifically disavowed in the Court of Appeals.

By implying that their challenge in the courts below was broader than it actually was, petitioners are able to characterize the result of the Company's renunciation of the offset at issue as "limited". In fact, the renunciation was as broad as the issue presented: there was nothing left in controversy between the parties.

In a similar manner, petitioners now assert that Southwestern Bell respondents perpetrated a fraud on the Missouri courts in the mid-1960's. Pet./Cert. at 7-8. They cite nothing in the record to support such a serious allegation, nor was this claim ever pleaded as actionable conduct in their second amended

complaint filed below.[11] Their recitation of what they claim to be the Plan's history, *see* Pet./Cert. at 6-7, is simply irrelevant: none of the exhibits cited in support of this contention establish that the Southwestern Bell Employee Benefits Committee ever adopted, as its interpretation of the Southwestern Bell Plan's provisions, the recommendations of AT & T.[12] Nor does it add anything to Respondent's unpleaded fraud claim.

Petitioners' assertion that Southwestern Bell's Employees Benefits Committee violated ERISA by taking positions and representing interests adverse to beneficiaries in workers' compensation proceedings is also without support in the record. In fact, the record reveals that since 1972, the Benefits Committee had no responsibility for making company decisions in workers' compensation cases, and did not involve itself with claiming the

---

[11] CR, pp. 22-31. Even under federal notice pleading, the circumstances constituting fraud must be alleged with particularity. Fed.R.Civ.P. 9(b). The complaint is totally devoid of any fraud allegations, either particular or general.

[12] An AT & T witness, Therese Pick, Director of Benefit Administration and Secretary of the Employees' Benefits Committee of AT & T, testified that the various Bell Systems companies are not required to follow AT & T's recommendations on benefit plans; that AT & T Serial Letters, such as Serial 124, issued in 1942, were sent to the companies merely so that they would have the beneift of AT & T's thoughts on the matter; that the sickness and accident benefits plans of the various companies, while similar, are separate company plans; and that an AT & T Benefits Committee communique, although binding on AT & T, is only a suggestion or recommendation as to the Benefits Committees of the other companies. Pick Deposition Transcript, p. 74, lines 6-24; p. 81, lines 7-20; p. 83, lines 3-10; p. 90, lines 1-18. Petitioners' assertions that AT & T's plan "interpretation" somehow interpreted the Southwestern Bell Plan is simply contrary to the testimony of AT & T's witness. Furthermore, the exhibits cited in footnote 5 of the Petition either do not involve the Company and its Plan, or do no more than show that it was suggested that AT & T's recommendation be implemented.

challenged offset.[13] Workers' compensation claims were not submitted to the Benefits Committee: only final settlements of such claims were submitted.[14] Moreover, the attorneys who defended the workers' compensation claims represented the Company, not the Benefits Committee.[15]

Finally, the repealed Missouri statute allowing the offset did so with reference to the employer. *See* Mo.Rev.Stat. §287.160.3 (Supp. 1979). The Company is the employer of Wilken and Ramsey, not the Benefits Committee. Under the repealed statute, therefore, only the Company could claim and take the offset.

The foregoing discussion demonstrates the inapplicability of *Schneider Moving & Storage Co. v. Robbins*, ____ U.S. ____, 80 L.Ed.2d 366 (1984) and *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), principally relied upon by petitioners. *See* Pet./Cert. at 5, 12, 16-17, and 20-21. There is simply no factual basis for petitioners' repeated assertions of "dual loyalty" and "fiduciary misconduct." Quite to the contrary, both Wilken and Ramsey testified that they received all benefits due them under the Plan, and neither of them had any claim for additional Plan benefits.[16] The Benefits Committee had directed the Plan to pay them these benefits, and had also invited Wilken to appeal its decision to treat his claim for Plan benefits as a

---

[13] Brockman Deposition Transcript, pp. 56 and 76.

[14] McGrath Deposition Transcript, p. 43.

[15] CR, pp. 133 and 135-136; Hollie Deposition Transcript, pp. 5-6 and 11.

[16] Wilken Deposition Transcript, p. 50; Ramsey Deposition Transcript, pp. 17-18; Class Certification Hearing Transcript pp. 20-21 and 46.

"sickness" rather than an "accident".[17] Wilken did not appeal.[18] The record in this case establishes that the Benefits Committee fully discharged its fiduciary duties under the Plan.

The Eighth Circuit was not in error, therefore, for not considering fiduciary removal as an available ERISA remedy, as petitioners contend. Pet./Cert. at 11. There was no basis in the record for granting such a remedy, unlike the situation in *Katsaros v. Cody,* 744 F.2d 270 (2d Cir. 1984). In that case, there was evidence of two imprudent loans of plan funds approved by plan fiduciaries. *Id.* at 281. In this case, the record reveals that the members of the Employee Benefits Committee fully discharged their fiduciary duties by paying Wilken and Ramsey their Plan benefits and that the committee members were not involved in workers' compensation proceedings. Moreover, the members of the Benefits Committee are not parties to this present action, unlike *Katsaros.* The courts below could not have considered their removal because they are not parties to this action. *See* Fed.R.Civ.P. 19.

There is no basis for petitioners' contention that the Court of Appeals erred in holding that this case is moot. They present no issue worthy of review by this Court.

---

[17] Affidavit of Mary Thompson, CR, pp. 138-139; 8/17/76 letter to Wilken (Southwestern Bell Exhibit A, p. 5).

[18] McGrath Deposition Transcript, p. 40.

II.

The writ should be denied because the rationale for the *Teamsters* doctrine is inapplicable to this case and the issue presented in not ripe for review.

Petitioners' contention that the "discouragement" doctrine is applicable to this case misconstrues the basis for this Court's holding in *United Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The doctrine announced in that case arose out of an action filed pursuant to Title VII. That statute prohibits discrimination in employment.

In this case, on the other hand, ERISA does not prohibit integration of ERISA benefits and state law benefits. Integration of ERISA regulated plan benefits with those payable under state law is lawful, even when integration results in the reduction or denial of ERISA benefits. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-21 (1981). In this case, Wilken admitted that he received his ERISA benefits and had no claim for additional sums against the Plan.[19] He was not "discouraged," therefore, from applying for and receiving ERISA benefits. His claim was not based upon a reduction or denial of ERISA benefits, but upon a potential reduction or denial of a possible permanent partial disability award under the state workers' compensation law.

Teamsters did not hold that an employee who had received all of his ERISA benefits had a cause of action under ERISA because he was "discouraged" from pursuing a possible award of workers' compensation. The holding of *Teamsters* was premised upon the fact that the statute involved prohibited the very conduct which "discouraged" persons from applying for positions with an employer. ERISA does not prohibit integration: it allows it. *Alessi, supra.* Furthermore, the "discourage-

---

[19] Wilken Deposition Transcript, pp. 26, 49, 50; Class Certification Hearing Transcript, p. 46.

ment" doctrine appellants seek to engraft upon this case is inapplicable because it arises out of cases involving parties in unequal bargaining positions. Wilken, however, had both counsel and a forum to protect his interests, and was before the forum with a filed claim. He could have proceeded with his claim and challenged the offset. He did not do so. Instead, he withdrew his claim after consultation with his attorney, and never asked the Division of Workers' Compensation to withdraw the dismissal of his claim.[20] The concern of *Teamsters* with protecting persons in unequal bargaining positions is simply not applicable to this case.[21]

Moreover, the decision of the Court of Appeals is correct in light of this Court's recent decision in *Brown v. Hotel and Restaurant Employees,* ____ U.S. ____, 82 L.Ed.2d 373 (1984). In that case, this Court vacated the judgment of the Seventh Circuit that held, in part, that a New Jersey statute was preempted by ERISA, 29 U.S.C. §1144(a). This Court held that the pre-emption issue was not ripe for review because, although the state commission had asserted its authority to impose a sanction under the challenged statute on a union, it had never done so, and this Court was "presented with no concrete application of state law." *Id.* at 390. In the same manner, the Company's request for the challenged offset pursuant to the now repealed Missouri statute in Wilken's compensation proceeding was not ripe for review because the Company never imposed the offset

---

[20] Wilken Deposition Transcript, pp. 21-22.

[21] That concern is even less applicable here because Wilken had three forums available: the Division of Workers' Compensation, arbitration under the collective bargaining agreement (*See* 1980 Agreement of General Application Between Communication Workers of America and Southwestern Bell, Art. VII, Pensions, Disability Benefits, and Death Benefits) and the Employers Benefit Claims Review Committee (*see* Exhibit 1 attached to Southwestern Bell's answers to plaintiff's interrogatories at §3, ¶3). The foregoing sections are printed in Southwestern Bell's Appendix.

on whatever permanent partial disability award, if any, Wilken might have obtained. *See* App. A, p. A-4. Under *Brown,* the Court of Appeals' decision was correct, and petitioners present no issue worthy of review by this Court.

III.

The writ should be denied because claims for damages never properly presented below do not save this case from mootness.

Petitioners argue that their claims for "non-benefit damages" and "extra contractual compensatory damages," including prejudgment interest, were not mooted by the cessation of the offset practice they challenged. Pet./Cert. at 11-12 and 17-20. Most of these claims were never pleaded below, and were injected into this case only as an afterthought to avoid mootness.

Petitioners list the following as damages they now claim: time (wages) lost from work to attend depositions taken in this case; wages Hechenberger and Ramsey lost to attend state workers' compensation proceedings, and attorneys fees incurred in those proceedings; and prejudgment interest on the amount of offset claimed. Pet./Cert. at 17-18. With the exception of prejudgment interest, none of these items was pleaded or claimed in the second amended complaint.

The "extra-contractual" damages claim petitioners contend saves this case from mootness was never pleaded in their second amended complaint, nor was this claim raised in the counter affidavit of petitioners' counsel and the other material filed in opposition to respondents' summary judgment motion.[22] When

---

[22] CR, pp. 145-148. Furthermore, the damages claimed are special damages. Petitioners admit that they seek "non benefit" and "extra-contractual" damages. It is clear that such a claim is for special damages. *See, e.g., Western Casualty & Surety Co. v. Southwestern Bell Telephone Co.,* 396 F.2d 351, 356 (5th Cir. 1968) (attorneys'

all issues litigated below are moot, save one that received no attention in petitioners' complaint or affidavit and other material filed in response to the summary judgment motion, that issue does not save the case from mootness. *Social Labor Party v. Gilligan, supra.* This belated claim does not save the case from mootness.[23]

In addition, the claim for wages lost for time petitioners spent in depositions taken in this case is not a proper element of damages. It is axiomatic that a party who initiates a lawsuit cannot claim as damages expenses or losses incurred by reason of discovery properly engaged in by his opponent.[24]

---

fees). As such, they must be specifically stated in the pleadings. Fed.R.Civ.P. 9(g). Nowhere in the second amended complaint did petitioners allege wage losses or attorneys' fees incurred in state compensation proceedings. They cannot now attempt to inject these unpleaded claims into this case in order to avoid mootness. *See De Shields v. U.S. Parole Commission,* 593 F.2d 354, 356 (8th Cir. 1979) (compensatory damage claim did not destroy mootness of injunction claim when malice or personal involvement necessary to recover had not been alleged).

[23] Petitioners' reliance on *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* ____ U.S. ____, 80 L.Ed.2d 428 (1984) for the proposition that their claims are not moot because of a lack of specificity in the damage portion of their pleading is misplaced. In *Ellis* there was a claim for "monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights." *Id.* at 438 n.5. No such claim for compensatory damages is contained in petitioners' second amended complaint. Moreover, Rule 54(c) is inapposite. Judgment was rendered in favor of respondents, not petitioners.

[24] Petitioners do not contend that the depositions they attended were conducted in bad faith, so as to justify sanctions against respondents. *See* Fed. R. Civ. P. 30(d). Nor does the record reveal any such claim was made below.

Petitioners' argument that their claim for prejudgment interest avoids mootness is also infirm. They argue that because the amount of the offset claimed was not an issue, prejudgment interest ordinarily would be allowable. Pet./Cert. at 18-19. The amount of the offset claimed, however, is not what was at issue. The Company contested Ramsey's claim that he had sustained a temporary total or permanent partial disability as a result of his accident.[25] The Company also contested Wilken's claim, denying that he had suffered a job-related accident and further denying that he suffered any permanent partial or temporary total disability.[26] Thus, neither petitioner was assured of any award of compensation. Only if they received an award equal to or greater than the offset would the amount of offset claimed be the same as the amount of offset actually allowed. What petitioners really sought was that amount of a potential state workers' compensation award that would not have been paid because the offset at issue was allowed the Company. If the amount of the award had been less than the offset asserted, it would be the amount of the award that would be sought here, not the amount of the asserted offset.

The foregoing demonstrates that prejudgment interest would not be allowed in this case. The compensation claims were unliquidated and Missouri law has no provision authorizing interest on potential and unliquidated claims for compensation. *See Continental Bank & Trust Co. v. American Bonding Co.*, 630 F.2d 606, 612 (8th Cir. 1980).

---

[25] Exhibit 11

[26] Exhibit 21

Petitioners' argument is further flawed because it assumes not only that there was a sum certain (the amount of offset claimed), but that Southwestern Bell respondents "held" it. In fact, the record establishes that the Plan held nothing. It had paid all ERISA benefits owed. The Company likewise held nothing. It contested the compensation claims of Wilken and Ramsey. Until those claims were reduced to awards, Wilken and Ramsey were not entitled to anything. In Wilken's case especially, if the Administrative Law Judge had determined that he did not have a job-related injury, he would have received no award of compensation. However, because no award had been made to either Wilken or Ramsey, there was nothing for the Company to "hold". Thus *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* ____, U.S. ____, 80 L.Ed.2d 428 (1984) is inapposite because the claim for interest in that case was based upon sums of money illigally held for a period of time. *Id.* at 438. Nothing was held in this case.

Petitioners further contend that this Court should hold their petition for decision pending disposition of the grant of certiorari in *Massachusetts Mutual Life Insurance Co. v. Russell,* No. 84-9, ____ U.S. ____, 83 L.Ed.2d 29 (1984). There is no basis for granting petitioners' request.

In *Russell* plaintiff sued to recover damages on a number of theories. *Russell v. Massachusetts Mutual Life Insurance Co.,* 722 F.2d 482, 484 (9th Cir. 1983), *cert. granted,* 83 L.Ed.2d 29 (1984). In this case, petitioners sued for equitable relief, primarily for injunctions and impressment of trusts. *See Hechenberger v. Western Electric Co., Inc.,* 570 F.Supp. 820, 822 (E.D. Mo. 1983). Their claim for "extra-contractual" damages was raised as an afterthought to avoid mootness. Unlike *Russell,* no live controversy exists with respect to these belated damage claims, for they cannot now be asserted to resurrect a moot case. *See Socialist Workers Parter v. Gilligan, supra.* Accordingly, the Eighth Circuit's decision does not con-

flict with that of the Ninth Circuit,[27] nor does this contention otherwise present an issue worthy of this Court's review.

---

[27] Petitioners did seek attorneys' fees and costs pursuant to ERISA 29 U.S.C. §1132(g), and punitive damages. *Hechenberger v. Western Electric Co., Inc.*, 570 F.Supp. 820, 822 (E.D. Mo. 1983). The Court of Appeals held that the request for fees and costs did not save petitioners' case from mootness. App. A, p. A-5. Petitioners do not challenge that holding in their petition, and it does not present an issue worthy of review. The District Court struck petitioners' punitive damage claim because, among other reasons, it was not supported by a sufficient allegation: petitioners merely alleged "deliberate" conduct. *Hechenberger v. Western Electric Co., Inc., supra.* The District Court's holding on this ground and the affirmance by the Court of Appeals presents no issue conflicting with the Ninth Circuit's decision in *Russell.* The Ninth Circuit expressly held that 29 U.S.C. §1109 authorizes an award of punitive damages only when a plan fiduciary "acted with actual malice or wanton indifference to the rights of a participant or beneficiary." *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 492 (9th Cir. 1983). Such conduct was neither alleged by petitioners nor is it evidenced by the record. Moreover, petitioners did not invoke the provisions of §1109 as a basis for their action. Pet./Cert. at 2. There is nothing presented by this claim warranting review in this Court.

CONCLUSION

The decision of the Court of Appeals is correct and fully comports with the decisions of this Court, and is not in conflict with the decisions of any other Circuit Court of Appeals. The Petition for a Writ of Certiorari presents no issue worthy of this Court's consideration, and it should be denied.

Respectfully submitted,

Henry D. Menghini*
Robert J. Krehbiel
Evans & Dixon
314 North Broadway
St. Louis, Missouri 63102
(314) 621-7755

Attorneys for Southwestern
Bell Respondents

Edgar Mayfield
Leo E. Eickhoff, Jr.
100 North Tucker Blvd., Rm 320
St. Louis, Missouri 63101
(314) 247-3353

Of Counsel

*Counsel of Record

APPENDIX

APPENDIX A

1980 Agreements, Communication Workers of America and Southwestern Bell, Article VII.

ARTICLE VII
PENSIONS, DISABILITY BENEFITS, AND DEATH BENEFITS

During the term of this Agreement, no change may be made without the consent of the Union in the existing "Plan for Employees' Pensions, Disability Benefits, and Death Benefits" which would reduce or diminish the benefits or privileges provided thereunder. Any claim that such benefits or privileges have been so diminished or reduced may be presented as a grievance and if not resolved by the parties under their grievance machinery may be submitted to arbitration pursuant to the provisions of Article IV hereof but in any such case any decision or action of the Company shall be controlling unless shown to have been discriminatory or in bad faith and only the question of bad faith or discrimination shall be subject to the grievance procedure or arbitration.

APPENDIX B

Southwestern Bell Telephone's Exhibit 1 (Sickness and Accident Disability Benefit Plan, §3, ¶3), attached to answers to plaintiff's interrogatories.

SECTION 3. ADMINISTRATION

3. a. If the authority to grant or deny claims is retained by the Employees' Benefit Committee and not delegated to an Area Benefit Committee, the Company shall appoint an Employees' Benefit Claim Review Committee, consisting of one or more persons who are not members of the Employees' Benefit Committee.

b. Any participant whose claim for benefits has been denied may, within 60 days after receipt of notice of denial, submit a written request for review of the decision denying the claim. In such case, the Review Committee, or the Employees' Benefit Committee, if denial was by an Area Benefit Committee, shall

(i) make a full and fair review of such decision within 60 days after receipt of the written request for review, or within an additional 60 days, provided the claimant is notified of the delay and the reasons for requiring such additional time; and

(ii) notify the claimant in writing of the review decision, specifying the reasons for such decision.

c. Any participant whose claim for benefits has been denied shall have such further rights of review as are provided in Section 503 of ERISA and regulations promulgated thereunder, and the Review Committee and Employees' Benefit Committee or Area Benefit Committee shall retain such right, authority and discretion as is provided in or not expressly limited by said Section 503 of ERISA and the regulations thereunder.